BEFORE THE MONTANA DEPARTMENT
OF LABOR AND INDUSTRY

IN THE MATTER OF HUMAN RIGHTS BUREAU CASE NOS. 0083012911 & 0083012912:

GEOFFREY ANGEL,	)	Case Nos. 851-2009 & 852-2009
	)	
Charging Party,	)	
	)	
vs.	)	**HEARING OFFICER'S DECISION**
	)	
BAXTER HOMEOWNERS' ASSOCIATION,) AND HIGH STREET PROPERTIES, INC.,	)	
	)	
Respondents.	)	

* * * * * * * * * *

I. PROCEDURE AND PRELIMINARY MATTERS

On March 24, 2008, Geoffrey Angel filed a Human Rights complaint against Baxter Homeowners' Association and High Street Properties alleging discrimination by failing to provide a reasonable accommodation for disabled persons by failing to keep the elevator in the Baxter Hotel open during business hours.

Hearing Officer Gregory L. Hanchett held a contested case hearing in this matter on April 16 and 17, 2009 in Bozeman, Montana. Angel represented himself. Arthur Wittich and Margot Barg, attorneys at law, represented Baxter Homeowners' Association. Todd Shea, attorney at law, represented High Street Properties.

Angel, Michelle Lindahl, Claude Matney, Marc Driscoll, Craig Fetterman, Laura Sacchi, and Ethan Cade all testified under oath. Exhibits HOA 101, 104, 105 (the same Exhibit as GCA Exhibit 001), 106, 107, 108c, d, e, f, f.1, g and h, 109, 113, 114a, b and c, 115, 118a, b and c, 123, and GCA 001, 005, 006, 046, 047, 048, 049, 050, and 051-065 and the exhibit marked as "Complaint" were admitted into evidence. Based on the arguments and evidence adduced at hearing as well as the parties' post-hearing briefs, the hearing officer makes the following findings of fact, conclusions of law, and decision.

II. ISSUES

A complete statement of the issues in this case is set forth in the April 14, 2009 final pre-hearing order issued in this case. Those issues are incorporated into this decision by this reference.

III. FINDINGS OF FACT

1. At all times pertinent to this matter, Angel has been a Montana licensed attorney actively practicing law. Angel has practiced disability and discrimination law and intends to continue to do so.

2. The Baxter Hotel is located on Main Street in downtown Bozeman, Montana. It has seven floors. The building is a mixed use building; that is, it has both commercial units and residential units. The first floor, the mezzanine level, and the second floor (which is really the third floor of the building) are all comprised of commercial units which house businesses that are open to the public. The top four floors are comprised of residential units with each floor containing five residential units.

3. Angel has owned a residential unit in the Baxter since before 2005. At all times material to this case, he has been a member of the Baxter Homeowners' Association with a right to vote on any action undertaken by the Homeowners' Association. In November 2005, Angel entered into a lease with Claude Matney to rent law office space on the second floor of the Baxter. At the time, Matney owned a block of commercial offices on the second floor of the building.

4. During the time that he maintained his law office in the Baxter, Angel had no employees.

5. The Baxter was built in 1929. There is a single elevator and a stairway that permit access from the ground floor to the commercial floors and the residential floors. The stairway from the ground floor is narrow and has turns in it. The only way that persons in wheelchairs can access the upper floors is through use of the elevator. In addition, other persons who are disabled (such as people whose disabilities would necessitate the use of a walker) cannot negotiate the stairs.

6. Between February 1, 2008 and January 9, 2009, the stairway from the lobby to the second floor remained unlocked.

7. The building is a condominium subject to Montana condominium laws and is managed and maintained by the Baxter Homeowners' Association. The owners of the commercial units and the residential units make up the association. Each owner has one or more votes depending on the number of units the owner owns. The Homeowners' Association

has enacted declarations that prescribe the rights and responsibilities of the owners and their guests. Because it is comprised of both commercial and residential owners, the Homeowners' Association has a duty to ensure that the interests of both types of owners are met.

8. In 1997, the Baxter Homeowners' Association amended the declarations by a majority vote. Declaration IV (E) (7) of the Baxter Amended Declarations provided:

> Use of the lobby and mezzanine for ingress and egress, and use of the passenger elevator shall be controlled in order to secure the safety of the occupants and their possessions. In that regard, all owners shall keep the lobby entrance locked during holidays (Thanksgiving Day, Christmas Day) and non-business hours (12:00 a.m. to 6:00 a.m.) and the elevator shall remain locked at all times. After use of the elevator, each owner shall verify that the elevator is locked. In the event that an owner fails to lock the elevator or lobby door, the Association may take reasonable steps to provide security, which may entail changing the lock system for the building and elevator, in order to prevent future failures.
>
> Exhibit 103, page 8.

9. Despite the existence of the by-law which required the elevator to remain locked at all times, up until February 1, 2008, the elevator remained unlocked during business hours.

10. The Homeowners' Association is lead by a board of directors that meets on a monthly basis. The various officer positions on the board are filled by unit owners who are nominated to the positions. When the board makes its decisions, the board members act independently of each other. Each board member makes up his or her own mind about how to vote on any given issue pending before the board.

11. At the time Angel moved his law office into the Baxter, and for sometime before that, the elevator was closed to general passenger use because it was in need of substantial repairs and was not safe for use. City of Bozeman elevator inspectors recommended to the association that the elevator be closed until repairs were made.

12. In conformity with the recommendations of the city, the association closed the elevator to general use. It remained closed to general use for a period of 12 months until July 2006. A resident could use the elevator only for the purpose of moving heavy items (i.e., furniture) to upper floors of the building. In addition, a restaurant in the building utilized the elevator to move beer kegs from its cooler located in the basement to the restaurant located on the ground floor.

13. Angel's lease with Matney contained no provision regarding the use of the elevator. However, the elevator was in the building and appeared to be an amenity of a lease hold of the unit which Angel leased from Matney.

14. David Loseff owns Baxter Main, a limited liability company that owns several of the commercial units in the Baxter. Baxter Main began its purchase of commercial units in 2004. In 2008, Baxter Main purchased the commercial units owned by Matney. At that point, Angel became a tenant of Baxter Main. Loseff serves as a member of the Homeowners' Association Board of Directors.

15. Baxter Main, being the owner of the first floor commercial space in the building, is responsible for locking and unlocking the front door to the building lobby.

16. Prior to the time that Baxter Main bought into the building, the building suffered from deferred maintenance issues, including deferral of needed maintenance to the elevator. The security in the building was lacking. The building had problems including drug addicts using the stairwells for taking drugs and other persons trespassing in the lobby and in the building. In addition, the building had problems with transients.

17. In September 2005, Baxter Homeowners' Association hired High Street Properties to manage the property. Michelle Lindahl and her brother owned and carried out the functions of High Street. As property manager of the Baxter, all actions which Lindahl undertook were done at the behest of the Homeowners' Association. Lindahl acted solely as the association's agent. Lindahl herself had no authority to carry out any duties unless such duties were directed by the association.

18. Lindahl did not maintain an office in the Baxter. Neither Lindahl nor her brother had responsibility for unlocking and locking the exterior door to the lobby. That was done by other persons.

19. In 2007, the board received a written complaint from residential unit owners regarding the unlocked elevator and the security threat that presented to the residents.

20. Angel signed one year lease extensions for the commercial unit he rented in 2006, 2007, and 2008. Exhibits 114a, 114b, and 114c. Significantly, on April 28, 2008, after he had filed the instant complaint, Angel signed a lease extension for the commercial space he occupied on the second floor which extended his lease through July 31, 2009.

21. Unit owner Christy Daisonville complained about not locking the elevator as required by board rules. Based on the security complaints, at the board's January 2008 meeting, the board voted to restrict access to the elevator in order to overcome security issues in the building by only permitting unit owners and tenants to access the elevator via swipe key cards. At this meeting, each of the directors acted independently in reaching his or her decision on the issue. Loseff, though a member of the board, did not hold any sway over the board and did not exert any undue influence in reaching the decision.

22. As a result of the board's resolution, the Homeowners' Association instructed Lindahl to prepare a letter on the Homeowners' Association's letterhead informing the unit owners that beginning on February 1, 2008 the elevator would be restricted at all times in conformity with the association's declarations. Lindahl prepared the notice and on January 31, 2008 posted the notice in conspicuous places around the building. Exhibit 001. The letter makes it clear, however, that swipe key cards would be made available to residents and tenants.

23. On January 31, 2008, Angel contacted Lindahl by phone and complained that the elevator was being restricted and that doing so was inappropriate. Lindahl told Angel that she would forward his complaint to the Homeowners' Association. Lindahl relayed the complaint to the board immediately. The board responded to Angel's complaint and Lindahl immediately forwarded the board's response to Angel.

24. On February 1, 2008, in accordance with the Homeowners' Association's decision, the elevator was restricted. Residents could access the elevator at any time utilizing their swipe key cards. Non-residents, whether or not disabled, could only access the elevator when accompanied by a resident utilizing a swipe card key.

25. Despite the restriction on the elevator, the building's stairwell door to the second floor remained unlocked. This allowed unfettered access to the second floor for persons who were not disabled. Historically, the door had been kept propped open.

26. After the elevator was restricted, the board was advised that the stairwell continued to remain open even though the elevator had been locked. Testimony of Laura Sacchi.

27. Angel's landlord's agent (Neil Baggett) also provided a letter to Angel on February 1, 2008 indicating that the elevator was being locked that day and providing Angel a swipe key card. Baggett's letter also advised Angel that other key cards could be provided to him. The swipe key card permitted Angel to lock and unlock the elevator on a "per ride" basis. This meant that use of the card would allow the user to summon the elevator and then ride it to any of the building's floors. Once the rider completed his trip, the elevator would then return to its restricted status. Angel in fact used his swipe key card to bring clients to his office.

28. Lindahl also offered to give Angel additional swipe key cards to access the elevator. Angel, despite having this knowledge, never requested any additional keys.

29. Nothing in the building's by-laws prohibited businesses on the second floor from placing a sign in the lobby indicating that a client could call the business in order to gain access to the second floor. Indeed, at least one of the second floor businesses, E-Wrangler's, did so.

30. A client could contact Angel by telephone and meet Angel in the lobby so that the client could be escorted up to Angel's office.

31. Lindahl passed Angel's complaint on to the board as she had promised. On Monday, February 18, 2008, Loseff, on behalf of the board, instructed Lindahl to pass along to Angel an e-mail that Loseff had prepared. Exhibit 109. In his personal capacity, Loseff opined that there was no violation of accommodation requirements as "everyone . . . . handicapped or otherwise . . . currently has 24/7 access for elevator use provided that they are properly met and escorted by owners, residents and/or tenants of the building." *Id.* Loseff also advised Angel that the association's attorney was looking into the issue of whether the elevator restriction was discriminatory. *Id.* In addition, Loseff invited Angel to contact the association's attorney and provide her with information that Angel had to show that locking of the elevator was discriminatory.

32. Loseff's e-mail was a good faith effort to engage Angel in a dialogue about the propriety of locking the elevator in light of the Homeowners' Association's legitimate security concerns in the building.

33. Angel, however, refused to budge. He obviously felt that nothing short of keeping the elevator unlocked during business hours would bring the building into compliance with the Montana public accommodations law. In response to Loseff's February 18, 2008 e-mail, Angel e-mailed Lindahl back to advise her that he was not satisfied with Loseff's response to his inquiry. Angel argued that Loseff's response "ignores or mischaracterizes our inquiry." Angel went on to note that restricting the elevator violated the American with Disabilities Act and that he had filed a complaint with the Montana Human Rights Commission. Exhibit 109.

34. Claude Matney also protested the locking of the elevator. In response to Angel's and Matney's complaints, the board took up the issue of locking the elevator at each of its board meetings in March 2008 and April 2008.

35. Angel's complaint to the Montana Human Rights Bureau is dated March 24, 2008. The board was served with Angel's complaint and took it up at its April 11, 2008 board of directors meeting. As noted in its minutes of that meeting, the board discussed options available to it including placing a telephone in the lobby that would permit a client to call up to a business or adding a sign in the lobby which provided contact information for the businesses on the second floor.

36. The second floor businesses were permitted to place signs in the windows of their second floor offices to advertise the presence of their business to the public.

37. During board meetings in March, April May, July, September, and October, the board continued to discuss the issues regarding elevator access and how to resolve the problem. To this end, the board surveyed other buildings that had similar security issues to determine what, if any, resolutions those buildings had come up with regarding elevator access. In addition, the board continued to discuss ways to resolve the human rights complaint that Angel had filed.

38. The Homeowners' Association's monthly meeting agendas for each month from January 2008 through January 2009 gave clear notice the board and association were at each of those meetings taking up the issue of the accessibility of the elevator and Angel's discrimination complaint. Despite being a member of the Homeowners' Association and having the right to attend all of these meetings, Angel attended none of them.

39. Baxter Main purchased the commercial unit which Matney leased to Angel after Angel had signed a lease extension with Matney to extend his lease until July 2009. During July 2008, Angel e-mailed Loseff to indicate that he would be willing to forego his lease renewal if Baxter Main would pay him $13,977.60. In response, Loseff declined to pay Angel to terminate his lease renewal. Instead, Loseff indicated that he would honor the terms of Angel's lease agreement with Matney for the balance of the extension period (until July 2009). HOA Exhibit 115. Angel's e-mail made no mention of any concerns about access for disabled persons to his office.

40. In addition to owning his residential unit at the Baxter, Angel owns a single family residence located at 803 West Babcock in Bozeman. That property was occupied by college students who were going to vacate in July 2008. Despite Loseff's offer to honor the terms of Angel's lease extension with Matney, Angel made a snap judgment to vacate his commercial space at the Baxter and move his law office to the Babcock address. At hearing, Angel conceded that his decision was not well thought out.

41. The Babcock location is not wheelchair accessible. HOA Exhibit 118a. Despite conducting his business from that location for almost ten months, Angel has yet to obtain an estimate to determine what it will cost to construct a wheelchair ramp to make his office handicapped accessible.

42. Either at or shortly after the October board meeting, the board settled on installing a time clock that would keep the elevator unlocked and accessible without a swipe key card between the hours of 8:00 a.m. and 5:30 p.m. during each day. Otis Elevators was selected to complete the work and they did so over a one week period in January 2009. Since that time the elevator has remain unlocked during regular business hours.

43. In addition to the installation of the time clock, the association amended its by-laws to require that the elevator remain unlocked to the mezzanine floor and the second floor between the hours of 8:00 a.m. and 5:30 p.m. each day. HOA Exhibit 120.

IV. OPINION[1]

A. *Baxter Homeowners Did Not Fail to Provide A Reasonable Accommodation.*

The Montana Human Rights Act's anti-discrimination provisions are very broad prohibitions, indicating a legislative intent to eliminate discrimination except under very limited circumstances. *See, e.g., Taylor v. Dept. of F.,W.P.* (1983), 205 Mont. 85, 666 P.2d 1228. The act makes it unlawful for a manager or owner of a public accommodation to "refuse, withhold from, or deny to a person any of its services, goods, facilities, advantages or privileges because of physical disability." Mont. Code Ann. § 49-2-304(1)(a). A public accommodation is any place that offers its services, goods or facilities to the general public. Mont. Code Ann. § 49-2-101(20)(a). Discrimination based on a physical disability includes the failure to make reasonable accommodations that are required by an otherwise qualified person who has a physical handicap. Mont. Code Ann. § 49-2-101(19)(b). However, an accommodation that would require undue hardship or that would endanger the health or safety of any person is not a reasonable accommodation. *Id.*

An aggrieved party may file a complaint under the Montana Human Rights Act. Mont. Code Ann. § 49-2-501(1). An aggrieved party includes anyone who can demonstrate a specific personal and legal interest, as distinguished from a general interest, and who has been or is likely to be specially and injuriously affected by a violation of the Montana Human Rights Act. Mont. Code Ann. § 49-2-101(2).

Montana looks to federal precedent for guidance when there are substantive similarities between the Montana and federal statutory language and the public policy considerations. *Butterfield v. Sidney Public Schools*, 2001 MT 177, 306 Mont. 179, 32 P.3d 1243; ***see also***, *Hafner v. Conoco, Inc.* (1994), 268 Mont. 396, 886 P.2d 947, 950-51. Montana amended its Human Rights Act to conform it to the language of the ADA in 1993. House Bill 496, Laws of Montana 1993, Chapter 407, ***see*** Preamble and Section 3. The Montana legislature presumably adopted the existing federal interpretations and applications of the ADA provisions to which the amendments conformed to the Human Rights Act. Because the language of Title III public accommodations is substantially the same as the Montana public accommodations statute[2], the

---

[1] Statements of fact in this opinion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

[2] Title III of the ADA, which applies to public accommodations, provides that "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation. Like its Montana counterpart, the ADA defines discrimination to include "a failure to make reasonable modifications in policies, practices, or procedures when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages or accommodations."

hearing officer finds it is appropriate to look to federal case law for guidance on the appropriate framework to determine whether or not the locking of the elevator under the facts of this case amounted to a failure to make a reasonable accommodation.

In an ADA case, the charging party has the burden of putting on evidence to establish that a modification was requested and that the modification was reasonable. *Johnson v. Gambrinus Co.*, 116 F. 3d 1052, 1059(5th Cir., 1997). A defendant may counter evidence of the reasonableness of the requested accommodation by showing that the accommodation is not reasonable. *Id.* If the charging party meets its burden, then the defendant must make the modification unless the defendant can show that implementing the modification would fundamentally alter the nature of the public accommodation. *Id.* The charging party at all times retains the burden of persuading the trier of fact that the request for accommodation was made and that it was reasonable. *Id.*

Applying the above precepts on the burden of proof to the Montana public accommodations statute, the charging party has the burden of showing that he is an aggrieved party, that he requested an accommodation, and that the accommodation sought was reasonable. An accommodation is not reasonable under the Montana accommodations statute if implementation of the accommodation would endanger the health and safety of any person.

Angel is an aggrieved person under the statute. He practices law in Montana and has in the past represented disabled clients. Angel has also indicated that he intends to continue to practice in the areas of discrimination law. He thus is an aggrieved party and has standing, as conferred by the Montana Human Rights statutes, to object to the locking of the elevator.

As Angel has standing, the question becomes whether or not he requested an accommodation and whether or not the accommodation was reasonable. There is no dispute of fact here that Angel requested the accommodation for his clients. The next question is whether the requested accommodation was reasonable. This is a question of fact to be determined from all of the circumstances in this case.

If the facts in this case showed only that in response to tenants' concerns and security concerns the association limited non-residents' use of the elevator to being accompanied by a resident with a swipe key card, the hearing officer would likely not find a failure to accommodate. In such circumstances, it would be clear that there was no discrimination because all non-residents, both disabled and non-disabled, were equally limited, though not denied, access to using the building due to safety considerations. Such a set of facts might well have brought the association's conduct within the gambit of the exception to the public accommodations statute, namely, safety of the residents.

---

42 USC 12182(a).

However, there is one additional fact that compels the hearing officer to find that Angel in fact did request a reasonable accommodation for his clients: the undisputed fact that the stairwell remained open even while the elevator's access was restricted. The stairwell to the second floor provided access only to persons who were not disabled. While the stairwell remained open, Angel's suggested accommodation that the elevator remain unlocked during business hours was reasonable.

As Angel has met his burden, the burden shifts to the Baxter Homeowners to show that implementing the accommodation would alter the nature of the service provided. With unfettered access to the second floor available to non-disabled visitors to the building via the stairwell, Baxter Homeowners would have a difficult (though not impossible) time showing that unfettered access via the elevator during business hours would alter the nature of the facility, i.e., make the Baxter less secure. Thus, if Baxter had done nothing to resolve the issue of the elevator, it is possible that the hearing officer might have found a violation of the reasonable accommodation statute.

However, Baxter did, in fact, finally undertake a reasonable accommodation: installing an automatic time clock which ensures that the elevator stays open during normal business hours and altering the by-laws to require that the elevator remains unlocked during regular business hours. While Angel has made some argument that the accommodation is not yet reasonable, the fact that the accommodation ultimately implemented was the accommodation Angel sought undercuts his argument. Indeed, resolving the elevator issue by implementing the very accommodation sought by Angel and then amending the by-laws to ensure tenant and owner compliance with the accommodation demonstrates that the accommodation is reasonable.

The real question here is not whether the accommodation ultimately implemented by Baxter Homeowners is reasonable. Rather, the real question is whether the delay in implementing the time clock resolution was so great that the delay amounted to a failure to accommodate. The analogous federal case law holds that a delay in providing a reasonable accommodation can amount to disability discrimination. *See, e.g., Terrell v. US Air,* 132 F.3d. 621, 627 (11th Cir. 1998); *Selenke v. Medical Imaging*, 248 F.3d 1249, 1262 (10th Cir. 2001). To determine whether a delay amounts to a failure to accommodate, courts review the totality of the circumstances, taking into consideration such factors as whether the defendant acted in good faith, the length of the delay, the reasons for the delay, and whether an alternative accommodation was offered during the delay. *Id.* at 1262-63.

The substantial evidence convinces the hearing officer that the association acted in good faith. Inherent in this question, of course, is the extent that the association was willing to interact with Angel to reach a reasonable accommodation. The association was bound by law to work with Angel to reach an accommodation and the association was clearly willing to do so. Angel, however, convinced that his accommodation was the only reasonable accommodation, was essentially unwilling to engage in any dialogue about an appropriate accommodation.

Angel's response to the board was in essence "my way or the highway," thus making it difficult for the association to work with Angel to reach a reasonable accommodation. Indeed, Angel himself could have attended and had input into the board meetings with respect to the accommodation to be implemented, but he failed to do so.

Nonetheless, the board itself at all of its meetings until the time clock was installed continued to look at alternatives to ensure that its accommodation was reasonable. The credible testimony is that the board, which was comprised of members such as Fetterman and Sacchi each of whom acted independently, was wrestling with the proper means to meet the requests for accommodation. The board looked at other similarly situated buildings to determine the propriety of the decision to restrict access to the elevator. The board minutes for the board's April meeting, for example, reflect that the board was looking at options to ensure appropriate accommodation for disabled persons. See Exhibit 108e. The board spent at least six meetings going through the issue of the locked elevator and the appropriate means to resolve the conflicting interests that the unit owners had presented to the board (one unit owner's complaint that the elevator needed to be restricted in accordance with the by-laws versus Angel's and Matney's concerns that the elevator must remain open at all times during business hours). Both Fetterman's and Sacchi's testimony, which the hearing officer finds credible, show that the board was acting in good faith to deal with the accommodation issue presented.

Angel's primary argument that the board did not act in good faith is essentially that the board was in the "back pocket" of Loseff whose ulterior motive in shutting down the elevator was to control ownership of the building's commercial space. This argument, however, is not supported by the substantial evidence in this case. The board's decision was made independently by each of the board members as demonstrated by the testimony of Sacchi and Fetterman. The board's decision was not motivated by any action of Loseff but instead came about as result of a unit owner's complaint that the by-laws were not being followed and after discussions about the building's security. There clearly had been problems with the building's security. The board was comprised of six independent members, all of whom were unit owners in the building. Loseff had no control over the other board members. The decision to restrict access to the elevator was not dictated by Loseff and was clearly not a power grab by Loseff as Angel has suggested.

Moreover, it does not appear that the board's decision to implement a time clock and change the by-laws was merely a belated attempt to avoid the consequences of illegal conduct. To the contrary, as demonstrated by the testimony of Fetterman and Sacchi, the decision was arrived at after careful and deliberate consideration of legitimate factors such as the competing interests of the unit owners, the need to change the bylaws, and looking at other permissible alternatives to accommodate disabled persons. The hearing officer thus finds that the board was acting in good faith.

The board's decision to restrict the elevator did not entirely cut off disabled persons' access to the second floor. An accommodation for providing access to disabled persons was in

fact implemented. In an effort to strike some type of balance to ensure that disabled persons did have access to the second floor, the board made available to unit owners swipe key cards. The board went further and was willing to provide additional swipe cards. Because Angel had swipe cards, Angel's existing clients presumably would not be hindered at all in gaining access to his office. With respect to new clients who might have come in off the street, Angel was not prohibited from placing a sign in the lobby which would have notified potential clients that they could call up to Angel's office. This point is proven by the fact that E-Wranglers placed such a sign in the lobby notifying its clients that they could call up to the E-Wrangler's office for access to the second floor.

The proffered reason for the delay, Baxter's evaluation of the options available, is a legitimate basis for delay. The hearing officer thus finds that this factor weighs in favor of finding that the delay was not so long as to amount to a denial to accommodate.

The greatest concern for the hearing officer is the length of time that it took to ultimately arrive at the decision to install the time clock. It is clear from the testimony of Ethan Cade that installing the time clock was not an inordinately long process. As Cade testified, and the hearing officer finds, ordering the time clock took one day and installing it took about one day. When compared to the time it took to ratify the decision to install the clock, approximately nine months, at first glance it could appear that the time period was so long as to amount to a unlawful delay in implementing a reasonable accommodation. However, it was not simply a matter of the board just up and deciding one day to install a time clock. Over that time period, the board only met at most eight or nine times. The board had to deal with competing interests among the unit owners, at least one of whom complained that the elevator was not being locked in conformity with the by-laws and then try to discern how to strike a balance between those competing interests. And then there was the question of the by-laws themselves which required that the elevator remain secured at all times. In order to even begin implementing Angel's suggested accommodation, the board would have to change the by-laws to require the elevator to remain unlocked during business hours.

Furthermore, although Angel's suggested accommodation was reasonable, it was not necessarily the one that the board had to implement. A defendant in a public accommodation case is required to implement a reasonable accommodation, not necessarily the best possible accommodation or the one sought by the plaintiff. *Selenke, supra,* 248 F.3d at 1261. It is obvious that at least certain members of the board (in particular Loseff) did not agree with Angel that restricting the elevator to swipe key card use violated the public accommodation statute. See, e.g., Exhibit HOA 115. Thus, it was not unreasonable for the board, facing conflicting views from the unit owners about locking the elevator and the prescription of the by-laws which required that the elevator be secured at all times, to spend time looking at and evaluating the options available in an effort to properly accommodate the concerns of the unit owners and the need to provide a reasonable accommodation to disabled persons.

The fact that a plaintiff is forced to take action to alleviate the perceived problem of the failure to accommodate can, of course, weigh in favor of finding a delay in implementation that amounts to a failure to accommodate. Under other circumstances, Angel's decision to move out of the Baxter might have convinced the hearing officer that an undue delay had occurred. But in this case, Angel's decision to move had nothing to do with the alleged lack of access to his office. His decision to move was, as Baxter's counsel argued in closing, due to Angel's inability to be in control of the situation. This is true for at least three reasons.

First, when Angel moved into the Baxter and then for a period of almost a year afterwards, the building elevator was not available to Angel's disabled clients because it was shut down due to safety concerns. This undercuts Angel's argument that client access via the elevator was critical to his business. Second, the coincidence of the availability of the Babcock house, coupled with Angel's agreeing at first to extend his lease with Matney and then seeking to terminate his lease upon a payment to him of $13,977.60 after he learned that Loseff would be buying Matney's units, points toward the conclusion that Angel moved out either because he did not want to be Loseff's tenant or because he had an opportunity to be in a building where he did not have to pay rent. Certainly, had Angel felt that the lack of accommodation was forcing him out of the Baxter, he would have mentioned it at some point in his July 15, 2008 e-mail to Loseff seeking $13,977.60 in order to vacate his Baxter office. The e-mail makes absolutely no mention of the lack of accommodation as a basis for Angel's seeking to terminate the lease. Third, Angel moved into a location that suffered from a lack of disabled access as well. The Babcock office he now occupies is clearly not accessible as demonstrated by Exhibits 118 a, b, and c. Had disability access been of so much concern to him, he would have at least considered other buildings with disability access. He did not do so. Because of these facts, the hearing officer concludes that Angel did not move out of the Baxter due to a lack of a timely resolution to the accommodation issue. Weighing all of the factors, as the hearing officer is required to do, the passage of time between the restricting of the elevator and the implementation of the time clock solution did not constitute a delay of such length that it amounted to a failure to accommodate.

B. *As the Agent of Baxter, High Street Has No Liability to Angel In Any Event.*

Even if the hearing officer had found that Baxter had violated the public accommodation law, he could not under the facts of this case and the applicable law find that High Street had. Throughout these proceedings, High Street has maintained that it acted only as Baxter Homeowners' agent with no power to ignore Baxter's command to lock the elevator and that it had no intention to discriminate against Angel. Based on this, High Street has argued that it has no liability under the common law of agency. Angel has maintained that High Street had liability both as an aider and abettor in the unlawful conduct. Angel has put forward no evidence to show that High Street had any intent to discriminate against him. Angel has not seriously disputed that High Street's only attachment to this case is the fact that it acted as Baxter's agent in signing the letter indicating that the elevator would be locked. Indeed, Angel has not sought any separate damages against High Street. Because there has

been no showing of malfeasance on the part of High Street and because High Street acted only as an agent of Baxter, High Street has no liability in this case.

The Montana legislature has decreed that the common law has no application where the law is declared by statute. Mont. Code Ann. § 1-1-108. Where there is no statute that covers the situation, the common law shall be the rule of decision provided it does not conflict with other statutes. *Id.* Furthermore, statutes that are in derogation of the common law are not to be strictly construed but rather are to be liberally construed "with a view to effect their objects and to promote justice." Mont. Code Ann. § 1-2-103.

The Montana Human Rights Act makes it unlawful for an owner, lessee, manager, agent or employee of a public accommodation to refuse, withhold from, or deny to a person any of its facilities because of physical or mental disability. Mont. Code Ann. § 49-2-304(1). The Act's anti-discrimination provisions are very broad prohibitions, indicating a legislative intent to eliminate discrimination except under very limited circumstances. *See, e.g., Taylor v. Dept. of F.,W.P.* (1983), 205 Mont. 85, 666 P.2d 1228.

Angel's argument that High Street "aided and abetted" the property owner to violate the Human Rights Act is not persuasive. The common law rule is that an agent cannot be held liable for aiding and abetting the principal when acting in its official capacity on behalf of the principal. *Fiol v. Doellstedt*, 50 Cal. App. 4th 1318, 58 Cal. Rptr. 2d 309 (1996). In *Fiol*, the court, citing the common law rule, rejected a charging party's argument that a supervising employee was liable for aiding and abetting his employer in unlawfully discriminating under the California Fair Employment and Housing Act (CFEHA). The supervising employee had failed to prevent other employees from discriminating against the charging party but had not himself engaged in any acts of discrimination.

The CFEHA contains the identical aiding and abetting provision contained in the Montana Human Rights Act. While the Montana Human Rights Act is broad in its scope, there is nothing in the act or its definitions that indicate that the legislature intended to abrogate the common law rule. Therefore, the hearing officer rejects Angel's argument that High Street can be found to have aided and abetted Baxter Homeowners under the parameters of the case as presented by the charging party.

The fact that an agent cannot conspire with the principal while acting in its official capacity on behalf of the principal, however, does not insulate an agent from the consequences of its own tortious conduct. Generally, agency law does not insulate an agent from its own tortious conduct because the agent's tort liability is not based upon the contractual relationship between the principal and agent but upon the agent's own obligation not to engage in tortious conduct. 3 Am. Jur. 2d *Agency* §298. Thus, an agent can be held liable for its own positive wrongs. *Id.* Moreover, an agent is not relieved from liability merely because he acted at the request, command or direction of the principal. *Id.* Where, however, a defendant acts as an agent for a known principal, the defendant-agent incurs no liability for a principal's breach of

duty. *Id.* This is the law of agency in Montana. *See, e.g., Bachman v. Gerer,* (1922), 64 Mont. 28, 298 P. 891.

The hearing officer has found no human rights case in Montana that addresses this issue. Other states having legislative acts containing language similar to the language of the Montana Human Rights Act have, however, considered the viability of a claim against an agent in a similar context. *See, e.g., Pelton v. 77 Park Avenue Condominium*, 825 N.Y.S. 2d 28 (App. 2006). At issue in that case was the property manager's liability for the building owner's decision not to provide what the charging party felt was a reasonable accommodation for his disability. The applicable statute prohibiting discrimination made it unlawful for "the owner, lessee . . . or managing agent thereof: . . . to discriminate against any person because of such person's disability" in the provision of services. *Id.* at 37, footnote 4. The charging party predicated its argument regarding the property manager's alleged liability not upon an affirmative wrongful act of the manager, but rather upon the manager's failure to counsel the property owner against the undertaking of a certain accommodation which the charging party felt was not reasonable. In reversing the trail court's denial of the manager's motion for summary judgment, the appellate court held that the property manager owed no duty to the charging party for its nonfeasance under the applicable discrimination law. *Id.* at 35, 36.

Here, Angel presented no substantial evidence that High Street's conduct was anything more than following its duty to its principal. There is no evidence that High Street desired to engage in any discriminatory conduct. There is no evidence that High Street had the power to direct Baxter Homeowners to either change its by-laws or to unlock the elevator. Indeed, the only link to High Street in this case is that one of its proprietors signed a notice prepared on Baxter Homeowners' letterhead at the direction of Baxter Homeowners indicating that Baxter Homeowners would be locking the elevator. There is no legally sufficient link to High Street in this case to show that it undertook any discriminatory action against Angel. Accordingly, even if Baxter Homeowners had violated the public accommodations statute, High Street could not be held liable for that violation.

V. CONCLUSIONS OF LAW

1. The Department has jurisdiction over this case. Mont. Code Ann. § 49-2-509(7).

2. Angel, because he practices discrimination law, has standing under the Montana Human Rights Act to pursue this claim.

3. Angel has not been discriminated against in this case. Implementation of an automatic time clock to ensure that the Baxter building's elevator remains open during business hours and the concomitant change in the building's by-laws that require that the elevator remain open during business hours is a reasonable accommodation for disabled persons.

4. The delay in implementing the accommodation was not so long as to constitute in itself a failure to accommodate under the Montana Human Rights Act.

5. Even if Baxter Homeowners was liable for failing to implement a reasonable accommodation, High Street Properties, acting only as Baxter's agent, could in no event be found liable.

VI. ORDER

Judgment is found in favor of Baxter Homeowners' Association and High Street Properties and Angel's complaint is dismissed.

DATED: May 22, 2009.

/s/ GREGORY L. HANCHETT
Gregory L. Hanchett, Hearing Officer
Hearings Bureau, Montana Department of Labor and Industry

ANGEL.HOD.GHP